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in the
Supreme Court
of the
United States

OCTOBER TERM 1989

JOHN V. CAPOZZI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A UNITED STATES DISTRICT COURT HAS THE INHERENT AUTHORITY TO GRANT JUDICIAL IMMUNITY TO PROSPECTIVE DEFENSE WITNESSES, WHERE SUCH RELIEF IS NECESSARY TO GUARANTEE FUNDAMENTAL FAIRNESS TO A DEFENDANT AND AVOID PROSECUTORIAL MISCONDUCT?

II.

WHETHER A DEFENDANT IS ENTITLED TO INTRODUCE EXTRINSIC EVIDENCE OF A PROSECUTION WITNESS'S BIAS OR MOTIVE TO TESTIFY FALSELY, INDEPENDENT OF ANY AGREEMENT BETWEEN THE WITNESS AND THE GOVERNMENT?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are the Petitioner, his family, and the United States of America.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Procedural Status	3
B. The Facts	4
REASONS FOR GRANTING THE WRIT	8
I. A UNITED STATES DISTRICT COURT HAS THE INHERENT AUTHORITY TO GRANT JUDICIAL IMMUNITY TO PROSPECTIVE DEFENSE WITNESSES, WHERE SUCH RELIEF IS NECESSARY TO GUARANTEE FUNDAMENTAL FAIRNESS TO A DEFENDANT AND AVOID PROSECUTORIAL MISCONDUCT	8

TABLE OF CONTENTS—(Continued)

	Page
II. A DEFENDANT IS ENTITLED TO INTRODUCE EXTRINSIC EVIDENCE OF A PROSECUTION WITNESS'S BIAS OR MOTIVE TO TESTIFY FALSELY, INDEPENDENT OF ANY AGREEMENT BETWEEN THE WITNESS AND THE GOVERNMENT	18
CONCLUSION	22
APPENDIX	App. 1

TABLE OF AUTHORITIES

Cases	Page
Earl v. United States, 361 F.2d 531 (D.C.Cir. 1966), *cert. denied*, 388 U.S. 921, 87 S.Ct. 2121 (1967)	13
Government of the Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980)	11, 14, 15
Pillsbury Co. v. Conboy, 459 U.S. 248, 103 S.Ct. 608 (1983)	10
United States v. Capozzi, 883 F.2d 608 (8th Cir. 1989)	2, 4, 10
United States v. Corbin, 734 F.2d 643 (11th Cir. 1984)	19
United States v. Eagle Hawk, 815 F.2d 1213 (8th Cir.), *cert. denied*, 108 S.Ct. 712 (1988)	11, 16
United States v. Hardrich, 707 F.2d 992 (8th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481 (1983)	11
United States v. Herman, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2014 (1979)	15
United States v. Payton, 878 F.2d 1089 (8th Cir. 1989)	16
United States v. Pennell, 737 F.2d 521 (6th Cir.), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906 (1985)	15

TABLE OF AUTHORITIES—(Continued)

Cases	Page
United States v. Ray, 731 F.2d 1361 (9th Cir. 1984)	20
United States v. Saettele, 585 F.2d 307 (8th Cir. 1978) (Bright, J., dissenting), *cert. denied,* 440 U.S. 910, 99 S.Ct. 1220 (1979)	12, 16
United States v. Tindle, 808 F.2d 319 (4th Cir. 1986)	13, 16
Other Authorities	
United States Constitution	
Fifth Amendment	2
Sixth Amendment	2
United States Code	
18 U.S.C. §371	3
18 U.S.C. §1006	3
18 U.S.C. §1341	3
18 U.S.C. §1343	3
18 U.S.C. §6001	10
28 U.S.C. §1254(1)	2
Federal Rules of Evidence	
608(b)	19
Supreme Court Rule 17	10

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, John V. Capozzi, petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Eighth Circuit in this case, which affirmed his convictions and sentences in the United States District Court for the Eastern District of Missouri.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit affirmed Petitioner's criminal convictions and sentence in a decision announced August 21, 1989. *United States v. Capozzi*, 883 F.2d 608 (8th Cir. 1989). That decision is reproduced in the Appendix. The appellate court denied rehearing on October 6, 1989. That order is reproduced in the Appendix. The trial court did not render any written opinions specifically directed to the questions presented in this certiorari petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be deprived of life, liberty, or property without due process of law. . .

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

STATEMENT OF THE CASE

A. Procedural Status.

John V. Capozzi (Capozzi) appealed his conviction, after a jury trial, on charges of conspiracy, fraud, and insider dealing. On June 24, 1987, Capozzi was charged by indictment with one count of conspiracy to defraud a savings & loan institution in violation of 18 U.S.C. §371 (Count 1), seven counts of wire fraud in violation of 18 U.S.C. §1343 (Counts 2-8), five counts of mail fraud in violation of 18 U.S.C. §1341 (Counts 9-13), and two counts of unlawfully receiving bank funds from insider transactions in violation of 18 U.S.C. §1006 (Counts 14 & 15). The charges arose out of an alleged scheme to defraud the United States and Bohemian Savings & Loan Association (Bohemian), an ailing St. Louis, Missouri, financial institution. On February 17, 1988, the jury found Capozzi guilty of all charges.

Capozzi appeared for sentencing on April 1, 1988, was adjudged guilty, received an aggregate sentence of eight years imprisonment, and was ordered to pay, as restitution, the sum of $2.47 million to the Federal Savings & Loan Insurance Corp. (FSLIC) within five years of his release. Capozzi was allowed to surrender to the institution designated by the Bureau of Prisons.

On appeal, Capozzi raised four issues, to wit: (1) the district court's failure to grant judicial immunity to defense witnesses; (2) the district court's limitation of relevant bias or motive evidence; (3) the lower tribunal's failure to dismiss the conspiracy and fraud charges; and (4) the court's failure to require a courtroom identification of the defendant. A panel of

the Eighth Circuit, affirmed Capozzi's convictions. *United States v. Capozzi,* 883 F.2d 608 (8th Cir. 1989). The court thereafter denied rehearing.

B. The Facts.[1]

In October 1982, Capozzi, a successful Florida real estate developer, secured a $945,000 construction loan from Bohemian for the completion of Cedar Villas, a large south Florida development. While negotiating that loan, Capozzi spoke with Dan Wood (Wood), Bohemian's President, about the desirability of purchasing a bank. Capozzi and Wood discussed whether he, Capozzi, would be interested in joining a group which was then attempting to acquire Bohemian.[2] Capozzi was interested, and in November 1982, he met with a group headed by Al Keller (Keller). Shortly thereafter, Keller submitted a formal offer to the Federal Savings and Loan Insurance Corp. (FSLIC) listing himself, Capozzi, and Jerome Nagelbush (Nagelbush), a Capozzi associate, as purchasers. Capozzi never saw Keller's proposal. In late 1982, FSLIC rejected Keller's proposal.

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[1]The factual recitation is adapted from the Eighth Circuit decision in *United States v. Capozzi,* 883 F.2d 608 (8th Cir. 1989).

[2]Bohemian was a state chartered savings and loan institution insured by the Federal Savings and Loan Insurance Corp. and subject to the jurisdiction of the Federal Home Loan Bank Board. Bohemian had been losing money for years and in 1981 was insolvent, losing $6 million per year. The federal regulators were, of course, interested in Bohemian's financial health and determined that its financial problems stemmed from incompetent management. The agencies, therefore, began to look for someone—a financial savior who could bring competent management to Bohemian—to either merge with or acquire the institution.

Wood immediately commenced discussions with Capozzi and Nagelbush concerning an alternate plan for acquiring Bohemian. Ultimately, Nagelbush opted out, but in January 1983, Capozzi submitted to the FSLIC his own purchase plan, using a combination of real estate and second mortgages as his primary investment vehicles. Capozzi's acquisition plan (1) guaranteed that the net worth of the institution would be maintained at a predetermined level, (2) required FSLIC to contribute $2.5 million to Bohemian outright, in addition to a $5.7 million subordinated debenture, to be repaid beginning five years after acquisition, and (3) called for Wood to remain as president of Bohemian. The Capozzi plan was riskier than standard practice, but FSLIC accepted the risk as a method to turn around the ailing thrift. After much discussion, FSLIC accepted Capozzi's proposal, and on December 1, 1983, (11 months later), the sale closed, making Capozzi the sole shareholder and chairman of the board of directors for Bohemian.

Immediately before taking control of Bohemian, and soon thereafter, Capozzi caused the institution to enter into transactions which ran afoul of banking laws. This resulted in, first, his removal from the bank and, ultimately, the present fifteen count federal indictment charging him with conspiracy, fraud, and insider dealing.

During a two week trial, the government's evidence arguably established that Capozzi orchestrated transactions which profited him or his associates at the expense of Bohemian in violation of federal banking laws. Capozzi defended all transactions as having been legitimate and approved. He attempted to call several

defense witnesses, who refused to testify once the government informed them that they were potential targets. The court declined to grant judicial immunity to these potentially exculpatory witnesses, even though the government previously had issued letters granting immunity to some of the witnesses if they testified on behalf of the prosecution.

The jury considered evidence concerning three principal transactions.

1. The Cedar Ridge Escrow

In October 1983, Bohemian, at Capozzi's direction, disbursed $140,000 to Capozzi associate Jerome Nagelbush, supposedly as a real estate escrow deposit on a property known as Cedar Ridge. Bohemian never purchased Cedar Ridge, however, and the $140,000 was never returned to the bank. A demand was made for return of that escrow deposit, but was never satisfied. When Bohemian's chief financial officer, Gary Schlette, requested documentation concerning the purported escrow payment for bank examiners, Wood, after consulting with Capozzi, described the payment as merely an interest free loan. No Bohemian books and records were altered at the suggestion or invitation of Capozzi, and all records adequately documented the transactions.

2. The Emerald Hills Transaction

In early 1984, Bohemian, under Capozzi's direction, purchased Emerald Hills Country Club (Emerald Hills), a one thousand unit apartment, golf course, and country club complex located in Hollywood,

Florida, for the sum of $10 million. As a sales commission, Capozzi directed the additional payment of $200,000 by Bohemian to Brinwo Development Corp. (Brinwo), a company owned by Capozzi associate James Inklebarger (Inklebarger). This amount was a normal commission for a transaction of that size. Neither Brinwo nor Inklebarger, however, played any role in the Emerald Hills transaction, according to government accounts.[3] Moreover, Inklebarger immediately transferred $198,000 back to Capozzi as a loan. Documentation reflected that this transaction was a loan, and that Capozzi had repaid this loan in part. Capozzi used funds from the account in which this money had been deposited in order to make the first quarterly payment required under the terms of his purchase of Bohemian. That account had sufficient other funds to pay the quarterly payment.

3. The Camelot Transaction

In 1983, prior to acquiring Bohemian, Capozzi through his corporation, Camelot at University Park, Inc. (Camelot), purchased a piece of undeveloped land in Miramar, Florida, for approximately $510,000. In early 1984, shortly after acquiring Bohemian, Capozzi, without disclosing his ownership of Camelot, directed Bohemian to contract to purchase the undeveloped Camelot property for the sum of $2.66 million. Capozzi's plan depended on what was alleged to be a fraudulent appraisal. Capozzi instructed his appraiser, Marvin Meacham, to value the undeveloped land as if it were developed property, a standard practice in the

[3]Inklebarger never testified at trial, due to government intimidation.

development industry. In sum, Capozzi presented Bohemian an appraisal based on development work which had not been performed. Capozzi used a portion of the proceeds he received from that transaction to make the second and third quarterly payments for Bohemian.

REASONS FOR GRANTING THE WRIT

I.

A UNITED STATES DISTRICT COURT HAS THE INHERENT AUTHORITY TO GRANT JUDICIAL IMMUNITY TO PROSPECTIVE DEFENSE WITNESSES, WHERE SUCH RELIEF IS NECESSARY TO GUARANTEE FUNDAMENTAL FAIRNESS TO A DEFENDANT AND AVOID PROSECUTORIAL MISCONDUCT.

The case presents a question of grave constitutional importance and exceptional public interest. It questions whether a district court, in order to be able to insure fundamental fairness and limit prosecutorial misconduct, has the inherent authority to grant judicial immunity to crucial defense witnesses. The government in this case deprived Petitioner of his right to present exculpatory defense witnesses, by waiting until the eve of trial before announcing that the three key witnesses on whom the entire defense depended, all of whom were known by the government to be critical defense witnesses, were considered unindicted coconspirators such that their testimony might subject them to prosecution. The government

intimidation of these crucial defense witnesses came a mere four days before trial, even though the case had been rescheduled three previous times, and seven months had passed between indictment and trial. During this period, Petitioner prepared his defense exclusively around the testimony of these three witnesses, all of whom were intimately involved in the events and transactions underlying the charges.[4] They were the only witnesses who were in a position to tell the jury the truth about the charged transactions. The prosecution knew that without these witnesses, the Capozzi defense was nonexistent.

The prosecution's planned tactic of waiting until the eve of trial before announcing that three crucial defense witnesses were considered coconspirators resulted in a total deprivation of Petitioner's right to fundamental fairness and compulsory process, where these witnesses refused to testify solely because of the government threat of prosecution. This government tactic caused a defense request for an immediate continuance of the trial and to seek a dismissal of the charges or a grant of limited judicial immunity to enable the presentation of a defense. The lower tribunal denied all relief, and concluded that a district court had no authority to compel the prosecutor to grant statutory use immunity or to fashion judicial immunity.

Relief was denied notwithstanding that the prosecution earlier had issued letters conferring immunity on a number of witnesses if they testified for

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[4]The defense had issued trial subpoenas to witnesses Inklebarger, Nagelbush, and Fishman, in mid-January 1988.

the government, one of whom was a witness who the defense intended to utilize as a defense witness. That the government had been ready, willing, and able to grant immunity to prospective witnesses, but refused to do so when the witnesses would give favorable testimony to the defense, totally undercut the Petitioner's right to fundamental fairness and to compel the attendance of witnesses. The appellate court ignored this critical point when it erroneously stated that "this is not a case where the government granted use immunity to its witnesses but refused to immunize defense witnesses." *United States v. Capozzi*, 883 F.2d 608, n. 9 (8th Cir. 1989).

This Court has not ruled on whether a trial court has inherent authority to grant use immunity. Appellate courts have considered this claim, with conflicting resolution of the judicial immunity question. Most importantly, the Eighth Circuit decision in this case conflicts with a decision of another court of appeals on the issue, and does so in a manner which begs for resolution by this court, consistent with the considerations governing review on certiorari set out in Supreme Court Rule 17.

This Court's only pronouncement on the subject of court ordered immunity came in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 103 S.Ct. 608 (1983), involving a discussion of *statutory* immunity, a wholly different type of immunity and what is involved in this case. In *Pillsbury Co.*, this Court held that only the Attorney General or his designated officers can grant statutory immunity pursuant to 18 U.S.C. §6001, *et. seq.*, and that "[n]o court has authority to immunize a witness." 459 U.S. at 261, 108 S.Ct. at 616. The question of

judicial immunity, however, has been considered and accepted by some courts, and rejected by other courts. Because the question goes to the very heart of a criminal defendant's ability to receive a fair trial, and relates to the tools available to a court to enforce that right, this issue is sufficiently compelling for certiorari review by this Court.

The judicial immunity issue represents a balancing of the competing government interests of winning criminal cases at all costs and insuring fundamental fairness to defendants. The ability of a court to grant limited judicial immunity in exceptional circumstances is the only way to insure a level playing field for all parties, so that the desired goal of **bringing out the truth** at trial can be achieved.

Whether a federal court has the inherent authority to grant judicial immunity to critical defense witnesses when immunity is necessary to avoid government misconduct, to enhance fundamental fairness, and to guarantee the right to compulsory process is a question new to this Court. Some courts have expressed doubt that such a power is inherent in the judiciary, *United States v. Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir.), *cert. denied*, 108 S.Ct. 712 (1988); *United States v. Hardrich*, 707 F.2d 992, 994 (8th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481 (1983), but the Third Circuit has held that a court can judicially immunize a defense witness so that exculpatory evidence may be presented. *Government of the Virgin Islands v. Smith*, 615 F.2d 964 (3d Cir. 1980). The availability of judicial immunity is a necessary and inherent judicial tool, which, when utilized wisely, can prevent the government from using its overwhelming power to deprive a defendant of the

ability to contest the government charges. The availability of judicial immunity is an important question for resolution by this Court, because it represents the only effective method by which to equalize a defendant's right to a fair trial with the government's unlimited prosecutorial powers.

In this case, the government's exercise of its prosecutorial powers was abused, with the seeming goal of obtaining a conviction against Petitioner at all costs. The losers in this clash were Petitioner initially and all of society ultimately. The end result was that Petitioner was left adrift in a sea of accusations, without any ability to channel present and available resources to counter the government's case. It cannot be doubted in this case that truth was the unfortunate victim. What the jury heard from the government witnesses was not the truth.

This Court should decide that in appropriate circumstances a district judge has the inherent authority to grant judicial immunity to clearly exculpatory defense witnesses when government conduct otherwise prevents a defendant from exercising the right to call these witnesses. The compelling and unique facts in this case presented such appropriate circumstances, such that the district court should have granted trial counsel's motion to fashion judicial immunity for the three critical defense witnesses, Inklebarger, Nagelbush, and Fishman.

In *United States v. Saettele*, 585 F.2d 307 (8th Cir. 1978) (Bright, J., dissenting), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1220 (1979), now-Senior Judge Bright made out a strong due process argument in favor of ordering

judicial immunity when the government immunized its chief witness but declined to grant immunity to essential defense witnesses. Judge Bright found support for his position in a decision authored by then-Judge Burger in *Earl v. United States*, 361 F.2d 531 (D.C.Cir. 1966), *cert. denied*, 388 U.S. 921, 87 S.Ct. 2121 (1967). Although that court refused to order immunity for a defense witness, Judge Burger hinted that had the government suppressed evidence, immunity might be warranted *if the prosecution had granted immunity to its own witnesses*, 361 F.2d at 534 n. 1:

> We might have quite different, and more difficult, problems had the Government in this case secured testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for Scott to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earl that the statute *as applied* denied him due process.

The Fourth Circuit, in *United States v. Tindle*, 808 F.2d 319 (4th Cir. 1986), held that judicial immunity should be granted when: (1) it is necessary to safeguard a defendant's right to essential exculpatory information; (2) *the prosecution one-sidedly immunizes certain witnesses who testify for the government but refuses to grant reciprocal immunity to other witnesses who might give helpful testimony to the defendant;* or (3) the prosecutor, by threats or other misconduct, intimidates a defense witness into refusing to testify. *Id.* at 324-325.

The Eighth Circuit panel decision conflicted with this persuasive legal authority, and also misapprehended the facts contained in the record. The most essential conflict is that the prosecution in Petitioner's case did offer and grant immunity to a number of people at the investigative stages of the case, one of whom was destined to be called as a defense witness. Obviously, when the government learned that this witness—Nagelbush—and others were going to tell the truth under oath *and exculpate* Petitioner, the government no longer had the interests of justice in mind. This is such clear evidence of misconduct that this Court is the last opportunity to correct this injustice.

That the Third Circuit stands alone, thus far, in recognizing the propriety of a grant of judicial immunity should not compel this Court to shy away from the issue. The Third Circuit's rationale is most compelling, enabling a court to blunt the unfair use of the government's power to prosecute or to protect, at its whim. The *Smith* court recognized that "the need for 'judicial'immunity is triggered... by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case." The rule announced by Smith requires a court to immunize potential defense witnesses only when it is found that the witness can offer testimony which is clearly exculpatory and essential to the defense case, and when the government has no strong interest in withholding statutory use immunity. Where the defendant can make a compelling demonstration that government decisions depriving a defendant of access to defense witnesses has a deliberate intention of distorting the judicial fact finding process, the need for judicial use

immunity is even more apparent. *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978), *cert. denied*, 441 U.S. 913, 99 S.Ct. 2014 (1979).

Here, Petitioner was unable to obtain the testimony of three crucial defense witnesses, only because the government identified them as unindicted coconspirators a mere four days before trial and refused to permit these witnesses to be immunized, even though the prosecutor did try to turn prospective defense witness Jacob Fishman into a prosecution witness, and had granted immunity to both actual and prospective government witnesses in connection with the investigation leading to the charges against Petitioner. The government's act of preventing the defense from presenting favorable and exculpatory testimony to the jury, by reason of the government's unreasonable and deliberate refusal to provide the same protection to these witnesses as it had provided to its own witnesses, constitutes a deliberate distortion of the judicial fact-finding process and violation of due process. *See United States v. Pennell*, 737 F.2d 521, 526 (6th Cir.), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906 (1985); *Smith*, 615 F.2d at 966 (3d Cir. 1980). The government here has played fast and loose, not only with Petitioner, but with the court system, by hiding the promises made to witnesses perceived by the prosecution to be "helpful," while denying the opportunity for the jury to hear the real truth in the form of defense witnesses. In exceptional cases like this, the ability of a court to grant limited judicial immunity is the only tool available to a court to protect defendants. The appellate court's refusal to recognize the value of this tool conflicts with other court decisions.

Although the Eighth Circuit has not yet recognized judicial immunity, *United States v. Payton*, 878 F.2d 1089, 1092 (8th Cir. 1989), various other decisions from that court have alluded to the need for this judicial remedy in exceptional circumstances. *See United States v. Eagle Hawk*, 815 F.2d 1213 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 712 (1988) (refusal by government to grant immunity to defense witness not error where anticipated testimony not clearly exculpatory); *United States v. Saettele*, 585 F.2d 307 (8th Cir. 1978) (Bright J., dissenting), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1220 (1979). The Fourth Circuit has refined the judicial immunity standard announced by *Smith* in *United States v. Tindle*, 808 F.2d 319, 324-325 (4th Cir. 1986), holding that judicial immunity *should be granted*, when: (1) it is necessary to safeguard a defendant's right to essential exculpatory information; (2) the prosecution one-sidedly immunizes certain witnesses who testify for the government but refuses to grant reciprocal immunity to other witnesses who might give helpful testimony to the defendant; or (3) the prosecutor, by threats or other misconduct, intimidates a defense witness into refusing to testify.

Petitioner's case cries out for an expansive application of the doctrine of judicial immunity. There is absolutely no doubt that the Inklebarger, Nagelbush, and Fishman testimony was clearly exculpatory and absolutely essential to the defense case, and was not found to the contrary by the appellate court. Since the complete defense to the three subject transactions was that the transactions were legitimate, the only individuals available to make that presentation to the jury were Inklebarger, Nagelbush, and Fishman. These three witnesses had indicated a willingness to testify, so

that the jury would learn the truth about the transactions.

Until four days before trial, everyone knew that these witnesses would testify for the defense. They were under subpoena. With the eleventh hour unavailability of these witnesses by being named "unindicted coconspirators,"[5] the defense had no opportunity to find new South Florida witnesses who could present the same testimony. After all, Inklebarger was the only person who could testify at trial that the money he received from Bohemian on the Emerald Hills sales was a valid real estate commission due him. Nagelbush was the sole witness for the escrow deposit sent to Mancuta. Fishman, moreover, knew that Bohemian President Wood was aware that Petitioner owned the Camelot property, that there was a commission due Inklebarger on Emerald Hills, and that the contract on the Camelot property was signed on the date indicated. The district court's attempt to fashion a suitable remedy by allowing prior testimony from a civil case to be read into the record was far from adequate to address Petitioner's constitutional concerns, where none of the prior testimony dealt with these specific issues.

It is apparent that the government deprived Petitioner of these witnesses because their testimony would have been disastrous for the prosecution. The appellate court approved that strategic decision.

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[5]The prosecution's failure to file this notice reasonably in advance of trial is sufficient evidence of "gamesmanship" to cast doubt on the legitimacy of its refusal to immunize these witnesses.

The prosecution was looking for an advantage, an edge, in this difficult case. The prosecution's sharp edge cut out the heart of Petitioner's case. The Eighth Circuit's refusal to embrace the judicial immunity doctrine creates clear conflict with other court decisions. The unique circumstances of this petition present a rare opportunity to authorize the grant of limited judicial immunity, where immunity was requested in the district court, the defense witnesses were ready, willing, and able to testify, their testimony would have been clearly exculpatory and essential to the case, and there were no strong governmental interests weighing against a grant of immunity. As a matter of law and public policy, courts should have the power to fashion judicial immunity where necessary to promote fundamental fairness. The interests of justice compel the use of this tool. The lower tribunal's refusal to recognize that inherent authority to promote justice must be reviewed by this court, with the ultimate goal of setting forth a cohesive standard by which to apply judicial immunity.

II.

A DEFENDANT IS ENTITLED TO INTRODUCE EXTRINSIC EVIDENCE OF A PROSECUTION WITNESS'S BIAS OR MOTIVE TO TESTIFY FALSELY, INDEPENDENT OF ANY AGREEMENT BETWEEN THE WITNESS AND THE GOVERNMENT.

Key government witness Gary Schlette, formerly the chief financial officer at Bohemian, attempted to establish that Petitioner engaged in undisclosed

affiliated transactions, acted against the best interest of the thrift, and profited at Bohemian's expense. Although Schlette appeared to testify out of a sense of loyalty to Bohemian, the defense took the position that Schlette lied repeatedly because of his bias against Petitioner and in an effort to curry favor with his government handlers, since Schlette wanted to remain in the government regulated banking industry. When the defense attempted to examine Schlette about his own conflict of interest transactions, Schlette denied the existence of any conflict. Then, when Petitioner thereafter sought to prove Schlette's bias through defense witness Richard Martin, the trial court denied him this opportunity, ruling that this was inadmissible collateral character evidence barred by Rule 608(b) of the Federal Rules of Evidence.

Because Rule 608(b) does not apply to attempts to demonstrate a witness's bias or motive for testifying falsely against the accused, Petitioner challenged the lower tribunal's ruling on appeal. The principal authority in support of this point, *United States v. Corbin*, 734 F.2d 643, 655 (11th Cir. 1984), recognized that Rule 608(b) does not apply "where the extrinsic testimony proffered would tend to show that the witness is biased against the accused." Yet, the Eighth Circuit panel rejected that argument for a legally incomprehensible reason, which conflicts with precedent from other courts:

> The record, however, reveals no evidence of any arrangement or deal between the government and Schlette. Absent evidence, showing Schlette had a reason to proffer

biased testimony against Capozzi, the district court applied Rule 608(b).

The court's conclusion that witness bias or a motive to testify falsely can only be shown where the witness has an express "deal" with the government is written out of whole cloth, is clearly erroneous, and represents a conflict with other cases suitable for review by this Court. No other case has set out this questionable standard. This "new rule" announced by the Eighth Circuit raises a question of serious concern to constitutional liberties which must be dealt with by this Court.

Schlette's bias against Petitioner should have nothing to do with Schlette's relationship with the government.[4] Indeed, in *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984), convictions were reversed where the district court refused to permit extrinsic evidence to prove the bias of a key prosecution witness. The extrinsic evidence, proof of post-plea drug trafficking, had nothing to do with the witness's relationship with the prosecution. Yet, it certainly was evidence which might have biased the witness against the defendant. Because of that, the case was reversed.

The same rule is applicable in Petitioner's case, where Schlette's insider trading was clear and substantial evidence of his bias against Petitioner and his motive for testifying falsely. Because Schlette was a

[4]The record reflected an abundance of reasons why Schlette wanted to curry favor with the prosecution and with FSLIC, in order to keep his ability to remain in banking and to avoid being prosecuted for his own insider trading.

crucial prosecution witness, without whom the government would not have been able to make a sufficient case, the failure to allow extrinsic proof of this evidence is clear error and conflicts with other decisions. This Court cannot allow that erroneous precedent to stand. This case is ripe for the granting of a writ of certiorari.

CONCLUSION

For the reasons stated, this Court should grant a Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

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February 2, 1990

Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1567

United States of America,

Appellee,

v.

JOHN V. CAPOZZI,

Appellant.

Submitted: December 13, 1988
Filed: August 21, 1989

Before Arnold and John R. Gibson, Circuit Judges, and ROSENBAUM,* District Judge.

ROSENBAUM, District Judge.

John V. Capozzi (Capozzi) appeals his conviction, after trial by jury, on charges of conspiracy, fraud, and insider dealing.[1] The charges arise out of his scheme to defraud the United States and Bohemian Savings and Loan Association (Bohemian), an ailing St. Louis,

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[1]On June 24, 1987, Capozzi was charged by indictment with one count of conspiracy to defraud a savings and loan institution in violation of 18 U.S.C. §371, seven counts of wire fraud in violation of 18 U.S.C. §1343, five counts of mail fraud in violation of 18 U.S.C. §1341, and two counts of unlawfully receiving bank funds from insider transactions in violation of 18 U.S.C. §1006. On February 17, 1988, the jury found him guilty of these charges.

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Missouri, financial institution. On appeal, Capozzi raises several alleged errors at trial, including the district court's[2] 1) failure to grant judicial immunity to defense witnesses, 2) limitation of bias or motive evidence, 3) failure to dismiss the conspiracy and fraud charges, and 4) failure to require a courtroom identification of appellant. For the reasons set forth below, we find no reversible error and affirm the judgment of conviction in all respects.

I. BACKGROUND

"Because the jury found appellant guilty on all counts, we recount the evidence presented in trial in the light most favorable to the prosecution." *United States v. Padilla*, 869 F.2d 372, 375 (8th Cir. 1989). In October 1982, Capozzi, a Florida real estate developer, secured a $945,000 construction loan from Bohemian for the completion of Cedar Villas, a large south Florida development. While negotiating that loan, Capozzi expressed to Dan Wood (Wood), Bohemian's president, his desire to purchase a bank. Capozzi and Wood discussed whether he, Capozzi, would be interested in joining a group which was attempting to acquire

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Capozzi appeared for sentencing on April 1, 1988, at which time he was adjudged guilty, and ordered to serve an aggregate of eight years imprisonment, and to pay, as restitution, the sum of $2.47 million to the Federal Savings and Loan Insurance Corp. within five years of his release from confinement.

[2]The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

Bohemian.[3] Capozzi was interested, and in November, 1982, he met with a group headed by Al Keller (Keller). Shortly thereafter, Keller submitted a formal offer to the Federal Savings and Loan Insurance Corporation (FSLIC) listing himself, Capozzi, and Jerome Nagelbush (Nagelbush), a Capozzi associate, as purchasers. In late 1982, however, the FSLIC rejected Keller's proposal.

Capozzi immediately commenced discussions with Wood and Nagelbush concerning an alternate plan for acquiring Bohemian. Ultimately, Nagelbush opted out, but in January, 1983, Capozzi submitted to the FSLIC his own purchase plan, using a combination of real estate and second mortgages as his primary investment vehicles. Capozzi's acquisition plan 1) guaranteed that the net worth of the institution would be maintained at a predetermined level, 2) required the FSLIC to contribute $2.5 million to Bohemian outright, in addition to a $5.7 million subordinated debenture, to be repaid beginning five years after acquisition, and 3) called for Wood to remain as president of Bohemian. After much discussion, the FSLIC accepted Capozzi's proposal, and on December 1, 1983, the sale closed,

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[3]Bohemian was a state chartered savings and loan instruction insured by the Federal Savings and Loan Insurance Corporation and subject to the jurisdiction of the Federal Home Loan Bank Board. Bohemian had been losing money for years and in 1981 was insolvent, losing $6 million per year. The federal regulators were, of course, interested in Bohemian's financial health and determined that its financial problems stemmed from incompetent management. The agencies, therefore, began to look for someone—a financial savior who could bring competent management to Bohemian—to either merge with or acquire the institution.

making Capozzi the sole shareholder and chairman of the board of directors for Bohemian.

Immediately before taking control of Bohemian, and soon thereafter, Capozzi caused the institution to enter into transactions which ran afoul of banking laws. This resulted in, first, his removal from the bank and, ultimately, the present fifteen count federal indictment charging him with conspiracy fraud, and insider dealing.

During a two week trial,[4] the government's evidence established that Capozzi orchestrated transactions which profited him or his associates at the expense of Bohemian in violation of federal banking laws. The jury considered evidence concerning three principal transactions.

A. The Cedar Ridge Escrow

In October 1983, Bohemian, at Capozzi's direction, disbursed $140,000 to Capozzi associate Jerome Nagelbush, supposedly as a real estate escrow deposit on a property known as Cedar Ridge. Bohemian never purchased Cedar Ridge, however, and the $140,000 was never returned to the bank. When Bohemian's chief financial officer, Gary Schlette, requested documentation concerning the purported escrow payment for bank examiners, Wood, after consulting with Capozzi, described the payment as merely an interest free loan.

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[4]After three successive trial settings, the trial began on February 1, 1988, and concluded on February 17, 1988.

B. The Emerald Hills Transaction

In early 1984, Bohemian, under Capozzi's direction, purchased Emerald Hills Country Club (Emerald Hills), a one thousand unit apartment, golf course, and country club complex located in Hollywood, Florida, for the sum of $10 million. Under the guise of a sales commission, Capozzi directed the additional payment of $200,000 by Bohemian to Brinwo Development Corporation (Brinwo), a company owned by Capozzi associate James Inklebarger (Inklebarger). Neither Brinwo nor Inklebarger, however, played any role in the Emerald Hills transaction. Moreover, Inklebarger immediately transferred $198,000 back to Capozzi. Capozzi used $123,000 of that money to make the first quarterly payment required under the terms of his purchase of Bohemian.

C. The Camelot Transaction

In 1983, prior to acquiring Bohemian, Capozzi, through his corporation, Camelot at University Park, Inc. (Camelot), purchased a piece of undeveloped land in Miramar, Florida, for approximately $510,000. In early 1984, shortly after acquiring Bohemian, Capozzi, without disclosing his ownership of Camelot, directed Bohemian to contract to purchase the undeveloped Camelot property for the sum of $2.66 million. Capozzi's scheme depended on a fraudulent appraisal. Capozzi instructed his appraiser, Marvin Meacham, to value the undeveloped land as if it were a developed property. In sum, Capozzi presented Bohemian an appraisal based on development work which had not been performed. Capozzi used a portion of the proceeds

he received from that transaction to make the second and third quarterly payments for Bohemian.

II. ISSUES ON APPEAL

Capozzi raises the following questions: 1) whether the district court properly refused appellant's request to judicially immunize three potential defense witnesses; 2) whether the district court properly limited bias or motive evidence, pursuant to Rule 608(b) of the Federal Rules of Evidence; 3) whether the district court properly denied appellant's motion to dismiss the conspiracy and fraud counts in light of *McNally v. United States*, 483 U.S.____, 107 S.Ct. 2875 (1987); and 4) whether a courtroom identification of Capozzi was essential in this case.

III. DISCUSSION

A. Defense Witness Immunity

Four days before trial, the government filed a bill of particulars naming five unindicted coconspirators. Three such named individuals were Capozzi associates Nagelbush, Inklebarger, and Jacob Fishman (Fishman).[5] During the trial, after the government had concluded its case, the defense called the three individuals to the witness stand out of the presence of the jury. Each man asserted that, if called, he would invoke his fifth amendment privilege and decline to testify. The district court determined that each of the

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[5]Fishman, a Capozzi lawyer, was intimately involved in the Camelot transaction and in concealing Capozzi's ownership interest in the Camelot property.

individuals had asserted his right to remain silent and, therefore, concluded it would be improper for the court to call these witnesses before the jury and compel them to claim their constitutional privilege. Accordingly, these potential defense witnesses were excused from testifying.

Capozzi's trial counsel advised the district court that the anticipated testimony of these individuals was crucial to Capozzi's defense. The government declined to apply for use immunity pursuant to 18 U.S.C. §6001, *et seq.*, and the district court took the position it had no authority to compel the government to offer statutory immunity. Capozzi then requested that the district court a) continue the matter,[6] b) dismiss the indictment with prejudice, or c) judicially immunize the witnesses and compel their testimony.

Capozzi did not seek an order from the district court compelling the government to immunize these witnesses.[7] Instead, he invited the district court to

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[6]Capozzi does not appeal the district court's denial of his requested continuance.

[7]It is settled law that a court is without authority to immunize a witness pursuant to the federal use immunity statute, 18 U.S.C. §6001, *et seq. Pillsbury Co. v. Conboy*, 459 U.S. 248, 261, 103 S.Ct. 608, 616 (1983). In *Pillsbury Co. v. Conboy*, the Supreme Court, while construing the federal immunity statute, declared, in dicta, "[n]o court has authority to immunize a witness." *Id.* The authority to immunize a witness, "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant statutory use immunity." *Id.; see also United States v. Doddington*, 822 F.2d 818, 821 (8th Cir. 1987) (the procedure for granting use immunity

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fashion an extraordinary remedy: judicial immunity, "the power of a court, unaided by statute, to order that a witness' testimony cannot be used against him." *United States v. Turkish*, 623 F.2d 769, 773 (2d Cir.), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856 (1981). The district court declined Capozzi's invitation, instead, granting him leave to present to the jury relevant portions of earlier sworn deposition testimony offered by all three men during civil proceedings before attorneys for the Federal Home Loan Bank Board and FSLIC in connection with Capozzi's actions at Bohemian.

On appeal, Capozzi claims 1) his defense depended on the testimony of these individuals; 2) the government knew this and, for seven months, lulled him into relying on the anticipated testimony of these witnesses; 3) the timing of the government's bill was designed to intimidate and discourage Nagelbush, Inklebarger, and Fishman from testifying; and 4) the government's denial of statutory immunity to these individuals forced them to assert their fifth amendment

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with respect to potentially incriminating testimony is provided in 18 U.S.C. §§6002 and 6003). Nor can a district court compel the government prosecutor to apply for statutory immunity. *United States v. Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 712 (1988); *see also United States v. Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977). Thus, the district court had no authority, as Judge Hungate correctly recognized, to order the prosecutor to grant statutory use immunity to these potential defense witnesses.

privilege thereby withholding exculpatory testimony which would otherwise have been available to him.[8]

In sum, Capozzi argues that government misconduct—the alleged purposeful eleventh hour notification that these individuals were unindicted coconspirators coupled with the prosecutor's refusal to offer statutory immunity—prevented him from presenting exculpatory evidence guaranteed by the sixth amendment's Compulsory Process Clause and denied him his right to due process protected by the fifth amendment.

Traditionally, defendants have used two theories in presenting due process arguments for immunization of defense witnesses. The first suggests setting the conviction aside to permit the balanced immunization of witnesses; the second would authorize judicial immunity.

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[8]Neither Nagelbush nor Inklebarger were asked by Capozzi's trial counsel to state their reasons for asserting their right to remain silent, and they gave none. Fishman, however, stated that he decided not to testify after learning of the bill of particulars and discussing his situation with his lawyer.

At no point in the trial did Capozzi's counsel request the district court to make further inquiry as to the validity of the fifth amendment claim of these individuals.

Capozzi argues for the first time on appeal that the district court did not adequately conduct a hearing concerning the validity of the fifth amendment privileges invoked by these potential defense witnesses. In the absence of a trial objection, we review that issue under the plain error standard. We find no plain error in the district court's decision to excuse these witnesses from testifying.

Considering the first possibility, some Courts of Appeals have suggested or held that if the government grants use immunity to its witnesses but refuses to offer immunity to potential defense witnesses, with the deliberate intention of distorting the judicial fact finding process, a defendant's right to due process may have been violated.[9] *United States v. Pennell*, 737 F.2d 521, 526 (6th Cir.), *cert. denied*, 469 U.S. 1158, 105 S.Ct. 906 (1985); *see United States v. Franz*, 697 F.2d 188, 191 (7th Cir.), *cert. denied*, 464 U.S. 828, 104 S.Ct. 104 (1983); *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 968-69, 974 (3d Cir. 1980); *United States v. Klauber*, 611 F.2d 512, 517-18 (4th Cir.), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1835 (1980); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir.), *cert. denied*, 426 U.S. 948, 96 S.Ct. 3167 (1976); *Earl v. United States*, 361 F.2d 531, 534 n. 1 (D.C. Cir.), *cert. denied*, 388 U.S. 921, 875 S.Ct. 2121 (1967); *see also United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983).

The recommended remedy in such cases, however, has not been a grant of judicial immunity to defense witnesses. Rather, a court should set aside the conviction and remand the case, in order to afford the government an opportunity to immunize both government and defense witnesses pursuant to 18

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[9]This is not a case where the government granted use immunity to its witnesses but refused to immunize defense witnesses. The government's chief witness, Dan Wood, another conspirator and the former president of Bohemian, testified pursuant to the terms of a plea agreement. Under the terms of that agreement, Wood plead guilty to one count of wire fraud in exchange for an agreement that this would be the only federal charge asserted, and his promise to provide truthful testimony at Capozzi's trial or any related proceeding.

U.S.C. §§6002 and 6003. *Pennell*, 737 F.2d at 526; *see Lord*, 711 F.2d at 891-92; *Smith*, 615 F.2d at 969 (when a court finds prosecutorial overreaching with the deliberate intent to disrupt the fact finding process, it should order the government to grant statutory immunity to defense witnesses or face a judgment of acquittal); *see also Klauber*, 611 F.2d at 518.

The second theory posits that a court has inherent power to immunize witnesses whose exculpatory testimony is essential to an effective defense. This thesis, that a court can judicially immunize a defense witness so that exculpatory evidence may be presented, has only been accepted in the Third Circuit. *Government of the Virgin Island v. Smith*, 615 F.2d 964 (3d Cir. 1980). In *Smith*, the court of appeals announced a rule which requires a court to immunize a potential defense witness when it is found that the witness can offer testimony which is clearly exculpatory and essential to the defense case, and when the government has no strong interest in withholding statutory use immunity. *Smith*, 615 F.2d at 974. Under *Smith*, a court's power to immunize witnesses is said to exist independently of the prosecutor's authority to grant statutory use immunity. The need for judicial use immunity is triggered neither by prosecutorial misconduct nor intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence. *Smith*, 615 F.2d at 974.

Appellant urges that this Court adopt the *Smith* formulation. Neither the Supreme Court nor this Court have ruled on whether a court has inherent authority to grant use immunity. We have, however, previously

indicated our doubt that such a power lies in the judiciary. *United States v. Hardrich*, 707 F.2d 992, 994 (8th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481 (1983); *United States v. Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir.), *cert. denied*, ____ U.S. ____, 108 S.Ct. 712 (1988); *see also United States v. Payton*, No. 88-1716, slip op at 6 (8th Cir., June 30, 1989). Every court of appeals which has considered the question has rejected the Third Circuit's *Smith* holding as being a violation of the doctrine of separation of powers. *See Mattheson v. King*, 751 F.2d 1432 (5th Cir. 1985), *cert. dismissed*,____ U.S. ____, 106 S.Ct. 1798 (1986); *Pennell*, 737 F.2d at 527; *United States v. Thevis*, 665 F.2d 616, 639-40 (5th Cir.), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57 (1982); *United States v. Turkish*, 623 F.2d 769 (2d Cir. 1980); *Earl v. United States*, 361 F.2d 531, 534 (D.C. Cir.), *cert. denied*, 388 U.S. 921, 87 S.Ct. 2121 (1967). We decline to follow *Smith* and reassert our doubt that the Court has the power to order such a grant of judicial immunity.

Even assuming a district court has authority to immunize defense witnesses, unaided by 18 U.S.C. §§6002 and 6003, it is clear that such an order is an extraordinary remedy, to be used sparingly, and then only where the proffered evidence is "*clearly exculpatory.*"[10] *Eagle Hawk*, 815 F.2d at 1217; *Hardrich*, 707 F.2d at 994.

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[10]*See Smith*, 615 F.2d at 968, 971-72 (the court of appeals, recognizing the potential interference with the prerogatives of the executive branch, conditioned conferral of judicial immunity on a defendant's making a convincing showing that: a) defendant properly sought immunity in the district court, b) the witness was available to testify but for his assertion of privilege, c) the

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The case before us does not warrant such extraordinary relief. Appellant suggests that prosecutorial misconduct prevented him from presenting a defense, thus violating his right to due process. Obviously, a prosecutor may not prevent a defense witness from testifying. *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967). To establish a denial of due process, however, the government's acts must be of such a quality as necessarily prevents a fair trial. *United States v. Rubin*, 836 F.2d 1096, 1101 (8th Cir. 1988) (*citing Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289 (1941), and *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872, 102 S.Ct. 3440, 3449 (1982)).

Appellant suggests that the timing of the government's notification of unindicted coconspirators was designed and intended to intimidate and discourage appellant's witnesses thereby interfering with the fact finding process. This suggestion is without merit. The seven month period from indictment to trial was more than an adequate time to prepare a defense. Moreover, the role of Nagelbush, Inklebarger, and Fishman in these transactions was known to all from the time the indictment was returned. Finally, there has been no showing by appellant of prosecutorial misconduct in making its immunity decisions. We find no absence of fairness here.

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proffered testimony was clearly exculpatory, d) the testimony was essential to the defendant's defense, and e) there was no strong government interest against immunity).

Furthermore, we find no violation of appellant's sixth amendment right to compulsory process.[11] To establish such a violation, there must be a showing of an absence of material testimony favorable to petitioner's defense. *United States v. Rubin*, 836 F.2d 1096, 1101 (8th Cir. 1988) (*citing Valenzuela-Bernal*, 458 U.S. at 867, 102 S.Ct. at 3447); *see also United States v. Holtzen*, 718 F.2d 876, 878 (8th Cir. 1983) (per curiam). The district court permitted Capozzi's trial counsel to present as evidence relevant portions of earlier sworn deposition testimony given by Nagelbush, Inklebarger, and Fishman. These statements were given at civil proceedings related to the fall of Bohemian. The district court permitted Capozzi's trial counsel to present to the jury as much of this material as he deemed necessary to his defense. On appeal, Capozzi fails to delineate any suggested testimony over and above that which was presented to the jury. In our view, Capozzi was permitted to present his version of the facts to the jury. There was no violation of appellant's right to compulsory process.

In light of appellant's failure to show that prosecutorial misconduct or overreaching prevented him from presenting his version of the facts to the jury, we find his due process assertion to be chimerical.

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[11] "[T]he ... Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness non-privileged testimony heard, but does [not] ... carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination.

Turkish, 623 F.2d at 774; *see also United States v. Saettele*, 585 F.2d 307, 311 (8th Cir. 1978) (Bright, J., dissenting), *cert. denied*, 440 U.S. 910, 99 S.Ct. 1220 (1979).

Consequently, we need not resolve, here, the ultimate question of whether a court has inherent authority to fashion such extraordinary relief as judicial immunity of potential defense witnesses. On these facts, we conclude the district court property refused to grant judicial use immunity Nagelbush, Inklebarger, and Fishman.

B. Exclusion of Martin's Testimony

While attempting to impeach government witness Gary Schlette, Bohemian's chief financial officer under Capozzi, defense counsel asked a series of questions concerning specific instances of conduct which took place prior to Capozzi's acquisition of Bohemian. Capozzi's counsel inquired of a) Schlette's employment contract with Bohemian; b) his actions, on Bohemian's behalf, to acquire Gravois Home Savings and Loan (Gravois); c) his participation in a group, which was attempting to pruchase Gravois during the same time period as Bohemian; d) his desire to be president of Gravois; and e) information he purportedly placed on an application of a $1.5 million universal life insurance policy from Richard Martin, a member of the group with whom Schlette attempted to purchase Gravois. The record shows Schlette answered all such questions.

Later in the trial, the defense attempted to introduce evidence, in the form of testimony by Richard Martin, concerning the same instances of conduct. The government objected to such testimony arguing it would be extrinsic evidence of a witness' character. Capozzi's counsel asserted Martin's testimony was being offered to prove Schlette's motivation to testify for the government, to show bias

against Capozzi, and to establish Schlette's motive for testifying for the prosecution against Capozzi. The district court refused to admit the offered testimony, pursuant to Rule 608(b)[12] of the Federal Rules of Evidence (Fed.R.Evid.). Capozzi challenges this ruling on appeal.

" 'To the extent that it is ever admissible, extrinsic evidence to attach credibility is usually subject to the discretion of the trial judge.' " *United States v. Corbin,* 734 F.2d 643, 655 (llth Cir. 1984) (*quoting United States v. Dinitz,* 538 F.2d 1214, 1224 (5th Cir. 1976)). Generally, "a party's right to impugn the character for truthfulness of an opposing party's witness is limited to questioning the witness on cross-examination. When such cross-examination testimony goes into evidence "the examiner must take his answer, and the examiner cannot offer impeachment testimony." " *Corbin,* 734 F.2d at 655 (*quoting United States v. Cohen,* 631 F.2d 1223, 1226 (5th Cir. 1980)). An exception to this general

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[12]Rule 608(b) provides in relevant part:

(b) Specific instances of conduct.

Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified...

Rule 608(b), Fed.R.Evid.

rule, however, has to do with offered testimony of bias. Facts showing bias are not collateral, and an examiner, of course, is not bound by the answer. *Johnson v. Brewer*, 521 F.2d 556, 562 n. 13 (8th Cir. 1975); *see also Corbin*, 734 F.2d at 655; *United States v. Ray*, 731 F.2d 1361, 1364 (9th Cir. 1984).

Appellant suggests that Martin's testimony would have shown Schlette's bias against Capozzi and his motive for testifying for the prosecution. Capozzi implies that Schlette testified for the government to avoid potential prosecution or other sanction because of his conduct at Bohemian. The record, however, reveals no evidence of any arrangement or deal between the government and Schlette. Absent evidence, showing Schlette had a reason to proffer biased testimony against Capozzi, the district court applied Rule 608(b).

"Reversal is warranted only where an abuse of discretion leads to prejudice." *United States v. Lynch*, 800 F.2d 765, 770 (8th Cir. 1986), *cert. denied*, 481 U.S. 1022, 107 S.Ct. 1907 (1987) (*citing United States v. Peyro*, 786 F.2d 826, 828 (8th Cir. 1986)). In light of the broad discretion afforded the trial court in regulating cross-examination, we find no abuse here.

C. *McNally* and the Fraud Convictions

The indictment charged Capozzi with Twelve counts of mail and wire fraud. Because the fraud counts included a paragraph alleging that Capozzi violated his

fiduciary duty to Bohemian,[13] appellant asserts those convictions, as well as the conspiracy conviction, must be reversed,[14] pursuant to *McNally v. United States*, 483 U.S. ____, 107 S.Ct. 2875 (1987). Capozzi contends that throughout the trial the government focused on his alleged breach of a fiduciary duty owed to Bohemian, thereby convicting him of mail and wire fraud based solely on his having participated in a scheme, the sole purpose of which was to deprive Bohemian of its intangible right to the honest and faithful services of its owner and chairman of the board of directors. We are unpersuaded by appellant's contention. *McNally* is simply inapposite.[15]

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[13]Paragraph 23 of Counts 2 through 8 (which is incorporated into Counts 9 through 13) provides:

> 23. It was further part of said scheme and artifice that John V. Capozzi would and did breach the fiduciary duty to Bohemian, its depositors, and its Board of Directors he as Chairman of the Board of Bohemian owed in that the actions described in paragraph 1-22, above, were not in the best interests of such persons and entities, but rather furthered the interest of John V. Capozzi at the expense of such persons and entities.

[14]Capozzi presented this issue in the form of a pretrial motion to dismiss and as a basis for judgment of acquittal, thus preserving this issue for appeal.

[15]In *McNally*, the Supreme Court concluded 1) the mail fraud statute, 18 U.S.C. §1341, was not intended to protect against schemes to defraud citizens of their intangible rights, and 2) Section 1341 is limited in scope to the protection of property rights. 483 U.S. at ____, 107 S.Ct. at 2879, 2881. That does not mean, however, that *McNally* eliminated Section 1341 prosecutions involving intangible rights where a property loss is proven. *See Carpenter v. United States*, ____ U.S. ____, 108 S.Ct. 316, 321-22 (1987). *McNally* requires a jury charge and proof

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The jury found that Bohemian suffered very tangible money losses to the gain of Capozzi or his associates. The evidence showed that in the Camelot transaction Capozzi purchased the undeveloped property for $510,000 and sold it to Bohemian for $2.66 million, with no disclosure of his own interest, and with a large amount of that money going into Capozzi's pocket. In the Emerald Hills deal, Capozzi directed a payment of $200,000 of which $198,000 was conveyed back to Capozzi. Finally, Capozzi used his position to direct a $140,000 payment from Bohemian to Nagelbush under the guise of an escrow deposit. Clearly, the money from these various transactions was a loss to the institution. The indictment's mere use of the word "fiduciary" does not mean that *McNally* renders it void.

The jury was property instructed[16] that financial loss to Bohemian and gain to the defendant are essential to a conviction for fraud. The jury, thus, was instructed that it must find a deprivation of tangible

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that the victim was defrauded of money or property. 483 U.S. at ——, 107 S.Ct. at 2882.

The *McNally* decision turned on the fact that there was no such jury instruction and the jury was not required to find that the victim was defrauded of any money or property. *Id.* The Supreme Court, therefore, concluded the jury could have convicted the defendant for conduct not within the reach of Section 1341. *Id.* Such is not the case here.

[16]Jury instruction number 23 defined the words scheme or artifice to include "any plan or course of action intended to deceive others, and to obtain by false and fraudulent pretenses, representations, or promises, money or property from persons so deceived."

property. We find the requirements of *McNally* have been fully satisfied. Accordingly, we find no reversible error in the district court's decision to deny Capozzi's motions to dismiss or for judgment of acquittal.

D. Courtroom Identification

At the close of the government's case, defense counsel moved for judgment of acquittal, citing as grounds, *inter alia*, that no witness had made a courtroom identification of Capozzi. The motion was denied.

Capozzi contends he was not identified at trial, leaving a reasonable doubt that he was the person accused in the indictment. Capozzi's final contention for reversal of his convictions is meritless. " 'Courtroom identification is not necessary when the evidence is sufficient to permit the inference that the defendant on trial is the person who [committed the acts charged].' " *United States v. Hoelscher*, 764 F.2d 491, 496 (8th Cir. 1985) (*quoting United States v. Fern*, 696 F.2d 1269, 1276 (llth Cir. 1983)). The jury found the evidence adduced at trial to be sufficient for that purpose, and we agree.

IV. CONCLUSION

After careful review of each of appellant's contentions, the judgment of the district court is affirmed in all respects.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1567EM

United States of America,

Appelee,

v.

John V. Capozzi,

Appellant.

Order Denying Petition For
Rehearing and Suggestion For
Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the Court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

October 6, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1265

In the Supreme Court of the United States

OCTOBER TERM, 1989

JOHN V. CAPOZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
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QUESTIONS PRESENTED

1. Whether a federal district court has inherent authority to grant judicial immunity to defense witnesses.

2. Whether the district court properly ruled that petitioner could not use extrinsic evidence to impeach the testimony of a government witness.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Autry v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984)	8
Daley, In re, 549 F.2d 469 (7th Cir.), cert. denied, 434 U.S. 829 (1977)	8
Government of the Virgin Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980)	6, 7, 9
Mattheson v. *King*, 751 F.2d 1432 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986)	8
McNally v. *United States*, 483 U.S. 350 (1987)	6
Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983)	8
United States v. *Alessio*, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976)	8
United States v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976)	8
United States v. *Eagle Hawk*, 815 F.2d 1213 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988)	8
United States v. *D'Apice*, 664 F.2d 75 (5th Cir. 1981)	8
United States v. *Graham*, 548 F.2d 1302 (8th Cir. 1977)	8
United States v. *Hardrich*, 707 F.2d 992 (8th Cir.), cert. denied, 464 U.S. 991 (1983)	8
United States v. *Heffington*, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983)	8

Cases – Continued: Page

United States v. *Hooks*, 848 F.2d 785 (7th Cir. 1988) 8
United States v. *Karas*, 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) 8
United States v. *Lenz*, 616 F.2d 960 (6th Cir.), cert. denied, 447 U.S. 929 (1980) 8
United States v. *Lowell*, 649 F.2d 950 (3d Cir. 1981) 7
United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985) 8, 9
United States v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) 8
United States v. *Tindle*, 808 F.2d 319 (4th Cir. 1986) 9
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) 8

Constitution, statutes and rule:

U.S. Const. Amend. V 4
18 U.S.C. 371 2
18 U.S.C. 1006 2
18 U.S.C. 1341 2
18 U.S.C. 1343 2
18 U.S.C. 6001 *et seq.* 8
18 U.S.C. 6002 ..... 2, 5, 8
Fed. R. Evid. 608(b) 5, 10

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1265

JOHN V. CAPOZZI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 883 F.2d 608.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1989. A petition for rehearing was denied on October 6, 1989. Pet. App. 22. The petition for a writ of certiorari was filed on February 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted

on seven counts of wire fraud (18 U.S.C. 1343); five counts of mail fraud (18 U.S.C. 1341); two counts of receiving improper payments from a bank (18 U.S.C. 1006); and one count of conspiring to commit those offenses (18 U.S.C. 371). He was sentenced to eight years' imprisonment and was ordered to pay $2,470,000 in restitution. The court of appeals affirmed. Pet. App. 1-21.

1. The evidence at trial, the sufficiency of which is not in dispute, showed that in 1983 petitioner purchased Bohemian Savings & Loan Association in St. Louis, Missouri. He then caused Bohemian to enter into various transactions that violated federal banking laws and that improperly benefited him and his associates. Pet. App. 2-6.

Petitioner, a Florida real estate developer, obtained a $945,000 construction loan from Bohemian in October 1982. During the negotiations for that loan, petitioner expressed interest in buying a bank. Bohemian's president, Dan Wood, suggested that petitioner join a group headed by Wood that was trying to purchase Bohemian, which was then insolvent. After the Federal Savings and Loan Insurance Corporation (FSLIC) rejected one proposal, petitioner tendered his own offer to FSLIC. Petitioner's plan called for FSLIC to infuse cash into Bohemian and for Wood to remain as president. FSLIC ultimately accepted petitioner's offer, and the sale was completed on December 1, 1983, with petitioner becoming the sole stockholder and chairman of the board of directors of Bohemian. Pet. App. 2-4.

Before he formally took over control of Bohemian, petitioner caused Bohemian to enter into at least two improper transactions. In October 1983, he had Bohemian turn over $140,000 to his associate, Jerome Nagelbush. That money supposedly was a real estate escrow deposit on a property known as Cedar Ridge; petitioner threatened to back out of his purchase of Bohemian if the payment were not made. Although Bohemian did not buy the property, the money

was never returned to the bank. Bohemian's chief financial officer later questioned the transaction and asked for documentation to provide to federal bank examiners. After consulting with petitioner, Wood described the payment as an interest-free loan. Petitioner also created documents after the fact to make the transaction appear legitimate. Pet. App. 4; 2/3/88 Tr. 39-44; 2/4/88 Tr. 111-117.

In another transaction that predated his purchase of the bank, petitioner used a corporation he owned – Camelot at University Park – to buy undeveloped land in Miramar, Florida, for some $510,000. Within days of acquiring Bohemian, petitioner had the bank contract to buy the Camelot property for $2,660,000. Petitioner did not disclose his ownership interest in Camelot; instead, he consistently represented that Jacob Fishman, who was his personal lawyer, headed the corporation. Petitioner concealed his ownership interest from Wood, from the other bank directors, and from federal regulators. Pet. App. 5, 6 n.5; 2/4/88 Tr. 65-72, 94-100. Petitioner also moved up the date of the closing on the sale to April 25, 1984, to ensure that the federal regulators' investigation of the bank did not interfere with the purchase.[1] Petitioner used a portion of the proceeds from the sale to make his required second and third quarterly installment payments on his purchase of Bohemian. Pet. App. 6; 2/4/88 Tr. 86-87.

In January 1984, petitioner caused the bank to buy another Florida property, an apartment and country club complex known as Emerald Hills. The purchase price was $10 million. However, petitioner had the bank's chief finan-

[1] The large profit from that transaction hinged on an inflated appraisal of the property. Petitioner obtained two appraisals that were too low for his purposes. He then hired an appraiser who arranged to appraise the undeveloped land as if it were developed. Pet. App. 5; 2/2/88 Tr. 120-127, 133-146, 158-169, 173-182.

cial officer wire an additional $200,000 to a development company that was owned by James Inklebarger, another of petitioner's associates. Petitioner claimed that the payment was a sales commission; in fact, Inklebarger's company played no part in the purchase of Emerald Hills and immediately transferred $198,000 of the $200,000 back to petitioner. Petitioner used $123,000 of that sum to make his first quarterly payment for the purchase of Bohemian. Pet. App. 5.

Petitioner and Wood also asked the bank's chief financial officer, Gary Schlette, to alter the bank's books and records to conceal certain disbursements that benefited petitioner and his associates. Schlette refused to do so and instead told federal authorities of his concerns. That information ultimately led to petitioner's indictment and conviction. Gov't C.A. Br. 9.

2. Four days prior to trial, the government filed a bill of particulars that named five unindicted co-conspirators; these included petitioners' associates Nagelbush, Inklebarger, and Fishman. At trial, petitioner sought to call those three individuals as defense witnesses. Outside the jury's presence, each man invoked his privilege against compulsory self-incrimination and declined to testify. The trial court ruled that because each had asserted his right to remain silent, petitioner could not call them as witnesses at trial.[2] Pet. App. 6-7.

Petitioner claimed that the three witnesses' testimony was crucial to his defense. When the government declined to seek

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[2] Petitioner did not ask two of the witnesses – Nagelbush and Inklebarger – their reasons for asserting the privilege. The third witness, Fishman, said he decided not to testify after learning that the government's bill of particulars had named him as an unindicted co-conspirator. At no point did petitioner's lawyer ask the trial court to inquire further as to the validity of the witnesses' Fifth Amendment privilege claims. Pet. App. 9 n.8.

use immunity for the witnesses under 18 U.S.C. 6002, the district court indicated it had no authority to order the government to offer statutory immunity to the witnesses. Petitioner then requested that the court grant the witnesses immunity based on its own inherent authority. The district court declined to do so. The court, however, permitted petitioner to introduce portions of the witnesses' testimony from sworn depositions in a related proceeding. Pet. App. 7-8.[3]

During his cross-examination of Schlette at trial, petitioner's counsel questioned Schlette about several specific instances of his conduct, including whether he had attempted to acquire another savings and loan association. Schlette answered all those questions. Pet. App. 15. Later, defense counsel sought to introduce evidence regarding Schlette's conduct. Relying on Fed. R. Evid. 608(b), the prosecutor objected on the ground that the proposed testimony constituted extrinsic evidence of specific instances of Schlette's conduct offered for the purpose of attacking his credibility.[4] Defense counsel claimed that the extrinsic evidence was admissible because it was offered to establish Schlette's bias and his motive for testifying against petitioner

[3] The depositions were taken during an FSLIC and Federal Home Loan Bank Board investigation of the activities of petitioner and Bohemian. Pet. App. 8.

[4] Fed. R. Evid. 608(b) provides in pertinent part:

> **Specific instances of conduct.** – Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

at trial. The district court held that the evidence did not bear on bias or motive and therefore excluded it. Pet. App. 15-16.

3. On appeal, petitioner renewed his claims concerning defense-witness immunity and the extrinsic evidence of Schlette's conduct. The court of appeals rejected both claims.[5] With respect to the issue of defense-witness immunity, the court noted that the only court of appeals that had held that a court has the power to grant judicial immunity to a defense witness was the Third Circuit in *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 974 (1980). Pet. App. 11-12. Although the court expressed doubts concerning the validity of the *Smith* case, it concluded that it did not have to decide that issue because, even assuming that a court could order a grant of judicial immunity, the facts in this case did not justify such relief. Because petitioner failed to point out any additional evidence that the witnesses would have provided at trial, the court of appeals held that the failure to immunize the three prospective witnesses did not impair petitioner's ability to present his defense to the jury. *Id.* at 14-15.

The court of appeals also upheld the district court's exclusion of extrinsic evidence of Schlette's alleged misconduct. The court recognized that facts tending to show a witness's bias are not collateral. As the court of appeals explained, however, there was no foundation for petitioner's claim that the extrinsic evidence was relevant to bias or motive on Schlette's part. The court therefore concluded that the trial court had not abused its discretion in refusing to admit the extrinsic evidence in question. Pet. App. 16-17.

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[5] The court of appeals also rejected petitioner's arguments that the mail and wire fraud counts were invalid under this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), and that, because no witness had identified him at trial, he was entitled to an acquittal. Petitioner does not renew those claims here.

ARGUMENT

1. Petitioner renews his contention (Pet. 8-18) that the district court had inherent authority to grant judicial immunity to prospective defense witnesses. The court of appeals, however, did not decide whether district courts have such authority. Instead, the court simply held that the circumstances in this case did not warrant a grant of judicial immunity to any of petitioner's witnesses, even assuming that district courts have the power to do so. Pet. App. 14-15.[6] Accordingly, the issue that petitioner seeks to litigate is not squarely presented in this case.

In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 972 (1980), the Third Circuit ruled that judicial immunity can be invoked where the following conditions are satisfied: "[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity." *Smith* underscored that testimony would fail to qualify under its rule if the testimony was ambiguous, cumulative, or not plainly exculpatory. *Ibid.* The same court later explained that in order to justify a grant of judicial immunity, the evidence sought by the defense must rise to the level that, if admitted, there is little doubt that the testimony would produce an acquittal. See *United States* v. *Lowell*, 649 F.2d 950, 964-965 (3d Cir. 1981).

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[6] The court stated:

> [W]e need not resolve, here, the ultimate question of whether a court has inherent authority to fashion such extraordinary relief as judicial immunity of potential defense witnesses. On these facts, we conclude the district court properly refused to grant judicial use immunity [to] Nagelbush, Inklebarger, and Fishman.

Pet. App. 15.

We disagree with the Third Circuit's conclusion that courts have "inherent" authority to immunize defense witnesses. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to grant immunity in the Executive Branch rather than the Judiciary. This Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). The corollary of that principle is that "[n]o court has authority to immunize a witness." *Ibid.* Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.[7]

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[7] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Mattheson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *D'Apice*, 664 F.2d 75, 77 (5th Cir. 1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); see also *United States* v. *Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir.), cert. denied, 464 U.S. 991 (1983).

Petitioner's suggestion (Pet. 15) that *United States* v. *Pennell*, 737 F.2d 521, 526 (6th Cir. 1984), cert. denied, 469 F.2d 1158 (1985),

The court of appeals in this case noted its skepticism about a court's authority to immunize defense witnesses. Pet. App. 12. The court correctly determined, however, that even assuming the existence of such judicial authority, petitioner did not satisfy the standards for invoking it. As the court of appeals pointed out, petitioner was able to present to the jury the same witnesses' earlier sworn deposition testimony. He thus had a fair opportunity to present his "version of the facts to the jury." Pet. App. 14. More fundamentally, petitioner has never indicated that the witnesses possessed additional evidence that would exonerate him. As the court of appeals explained, petitioner failed even "to delineate any suggested testimony over and above that which was presented to the jury." *Ibid.* Petitioner's argument therefore boils down to a claim that he is entitled to have his proposed witnesses immunized based on the speculative possibility that some favorable testimony might turn up. Such a claim would not prevail even under the most generous interpretation of *Smith*. There is accordingly no need for this Court to review the issue whether, in other situations, a court might enjoy the inherent authority to immunize defense witnesses.[8]

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supports his due process theory ignores that the court in that case explicitly refused to address any such claim, 735 F.2d at 526, and expressly disagreed with the holding in *Smith*, *id.* at 527. Likewise, petitioner's assertion (Pet. 16) that *United States* v. *Tindle*, 808 F.2d 319 (4th Cir. 1986), concluded that judicial immunity should be granted in certain circumstances is incorrect. The *Tindle* court observed that *Smith* has been "soundly criticized" and is "clearly the minority view," 808 F.2d at 325 n.4; it went on to reject the claim of judicial immunity in that case "[i]n light of Tindle's weak showing, and in light of the generally accepted view that a defendant has no right to defense witness immunity." *Id.* at 326.

[8] Petitioner argues (Pet. 10, 14, 15), for the first time, that he was entitled to have his witnesses immunized because the government im-

2. Petitioner also argues (Pet. 18-21) that the courts below improperly relied on Fed. R. Evid. 608(b) in denying him the opportunity to impeach Schlette through extrinsic evidence of Schlette's misconduct. This factbound claim warrants no further review.

Petitioner appears to argue that the court of appeals held, as a matter of law, that he was foreclosed from challenging Schlette's testimony for bias. The court of appeals, however, acknowledged that questions relating to a witness's bias are never collateral, and therefore that a defendant may introduce extrinsic evidence to show bias. Pet. App. 16-17. The court simply held that petitioner had failed to lay a sufficient foundation for the use of extrinsic evidence. As the court observed, *id.* at 17, the record failed to show that Schlette was attempting to curry favor with the government, so there was no showing of bias on Schlette's part. As such, the holding below simply constituted an application of a settled rule of law to a particular set of facts, not the announcement of a "new rule," as petitioner claims.

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munized some witnesses during the investigation of this case. But petitioner did not raise this argument below; instead, he relied only on the claim that the trial court had the power to grant judicial use immunity. See Pet. App. 11. Accordingly, petitioner is precluded from placing any reliance on the argument that defense witness immunity is required to balance the government's immunization of its witnesses. Moreover, the court below pointed out that the government did not immunize its trial witnesses, and that the chief witness, Bohemian president Dan Wood, testified pursuant to a plea agreement, not as the result of an immunity order. See Pet. App. 10 n.9.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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